

20 July 1947

MEMORANDUM TO THE DIRECTOR

Thru: ICAPS

Subject: Memorandum on IAB Procedures - 25 July 1947

OGC Has Reviewed

1. This office has been requested to give its opinion on the legality of the provisions of Paragraph 2 and 3 of the subject memorandum. Paragraph 2 provides for distribution of recommendations by an IAB member and that a vote be taken thereon. Paragraph 3 provides that recommendations, originating by any IAB member in which at least one other IAB member concurs, will be forwarded by the Director of Central Intelligence to the National Intelligence Authority, with his comments and those of other IAB members.

2. On Paragraph 2 alone, there is no question, as the IAB could not perform properly its advisory functions without the full opportunity to consider recommendations of its individual members. Paragraph 2 and 3 taken together, if followed literally, would compel the Director to submit recommendations with which he might disagree, to the NIA, if two or more members of the IAB concurred. Proposal of such compulsion requires a review of the responsibilities of the Director, and of the functions of the Advisory Board. At present these are set forth in the Presidential Directive of January 22, 1946, a document which does not have statutory authority, but has, upon the Executive Departments, the force and effect of law, and is therefore, subject to the normal rules of statutory interpretation. Without going in detail into the legal doctrines of such interpretation, it may generally be said that a law, or similar directive, is taken to mean exactly what it says, and only in the case of complete ambiguity, or of facts on which a distorted construction is proposed, is there need to go behind the final document in an attempt to determine whether the intent of the law given was other than appears on the face of the document.

3. It appears to us that the language of the present Presidential Directive is clear and non-controversial, and it is assumed that the wording was well considered when written. Thus, Paragraph 2, states that a Central Intelligence Group shall, under the direction of a Director of Central Intelligence, assist the NIA, and that the Director shall be responsible to the NIA. Paragraph 3 [a and b]

provides that subject to the direction and control of NIA, the Director shall accomplish the correlation and evaluation of intelligence relating to the national security, shall plan for the coordination of the activities of the Departments relating to national security and shall recommend to the National Intelligence Authority the establishment of policies and objectives to assure the most effective accomplishment of the national intelligence mission.

4. It seems clear that these paragraphs place in the Director, sole responsibility for correlation of intelligence, coordination of activities and recommendations to the NIA. It is obvious that departmental members of NIA act in a dual capacity, and in their capacity of Department Heads, must give heed to the recommendations and wants of their respective departments. It seems equally obvious however, that when they sit as the NIA, their attention focuses on the Director alone, for his recommendations on central intelligence matters. Any other concept would appear to be incompatible with the theory of central intelligence developed in the last few years, and which Congress has recently approved. The heart of this theory is placing on one point the responsibility for foreign intelligence affecting the national security, in such a way that responsibility could not be shifted from that spot to any other agency or group. To give a Board authority to compel recommendations over the Director's objection, would provide a basis for shifting responsibility from the Director to the Board. Since, as General Marshall pointed out recently, action by a Board is generally the action of compromise, the responsibility for such action falls nowhere.

5. It appears that this situation was clearly recognized by the President in establishing and assigning functions to the IAB. Paragraph 7, of the Presidential Directive, provides for the membership of the Board and states only that the Director shall be advised by such Board. We find some legal interpretation of the word "advise." Black's Law Dictionary, Third Edition 1933, definition of "advise", is "To give an opinion or counsel, or recommend a plan or course of action." It further cites the following court interpretations:

"This term is not synonymous with "persuade" Wilson v. State, 38 Ala. 417 or with "direct" or "instruct." Where a statute authorizes the trial court to advise the jury to acquit, the court has no power to instruct the jury to acquit. The court can only counsel, and the jury are not bound by

the advice. *People v. Horn*, 70 Cal. 17, 11 P. 470. "Advice" imports that it is discretionary or optional with the person addressed whether he will act on such advice or not. *State v. Downing*, 23 Idaho, 540, 130 P. 461, 462; *Brown v. Brown*, 180 N.C. 433, 104 S.E. 889, 890."

It seems clear therefore, that the IAB was to have no direct relationship, as a body, to the NIA, nor is the Director, in any way bound by their advice. He will, however, of course give due consideration to the merit of its content. Our conclusion is that establishment of the procedures in Paragraphs 2 and 3 of the IAB procedures, dated 25 July 1947, would be an unauthorized assumption by the IAB of responsibility vested in the Director by law. Conversely, agreement by the Director to exercise by the IAB of his recommending functions, would be an unwarranted divesting of assigned responsibility and, moreover, would not relieve him of accountability for results. He might, in such case, be the channel for policy recommendations with which he disagreed, but for which he would be held responsible.

6. Our opinion is not changed, and on the contrary, is confirmed by consideration of the *Merger Bill*, known as the *National Security Act*, of 1947. The sections pertaining to Central Intelligence provide Sections 105 (d) that it shall be the duty of the agency to advise the N.S.C. on intelligence activities of departments and agencies relative to the national security, to make recommendations to the President through the N.S.C., for coordination of intelligence activities relating to the national security and to correlate, evaluate, and provide dissemination of such intelligence. As emphasized by underlining, Congress uses a more positive word than "responsibility" and states it shall be the "duty" of the Agency to perform the functions outlined. The Head of the Agency is of course solely responsible for the performance of the Agency's duties. This is completely in accord with the intent of Congress, expressed so often in hearings and on the floor, that the Executive Branch, the Legislature, and through them the country, have one place to go for intelligence related to the national security, with no chance for evasion or excuse by the responsible officer.

7. There is no provision for the IAB in the Act and it is apparent that the protection of departmental intelligence called for in the proviso of sub-paragraph 105 (d) (3) is the responsibility of the N.S.C. By Paragraph 105 (f), the NIA and CIG cease to exist, and in effect the

Presidential Directive of January 22, 1946, is superseded and voided by the expression of the will of Congress. This, too, was repeatedly affirmed in hearings and debate on the Merger Bill, i.e. that functions of the Executive Branch should be established by Congress, not by Executive order. It would appear that presently the IAB has no legal status, and if it is to continue to function, it should do so only on direction from the H.S.C. as a result of a request from, and recommendations by, the Director of Central Intelligence.

LAWRENCE R. HOUSTON
General Counsel